

Uses of the Jersey Foundation

What is a Foundation?

Foundations to be established under the Foundations (Jersey) Law 2009 (the "Law") are vehicles for holding assets. They will be incorporated and therefore have separate legal personality. Foundations must be established with one or more objects. With the sole caveat that the objects must be lawful, they can be charitable, non-charitable or a mixture of both. Permissible objects might include, for example, benefiting a particular person or class of persons or carrying out a specific purpose or holding a particular asset.

A Foundation's powers will be exercised by its Council, which is similar to a company's board of directors. The Law will require however that at least one Council Member is registered under the Financial Services (Jersey) Law 1998 (the "FSL") to carry on foundation services business of this type (the "Qualified Member"). A further requirement of the Law is that every Foundation has a Guardian. The main job of the Guardian will be to ensure that the Council carries out its functions in order to achieve the objects. It will be possible for a Founder or the Qualified Member to be both a Council Member and the Guardian.

If there are beneficiaries of a Foundation, those beneficiaries are not owed duties either by the Council or the Foundation itself. It will also be possible to prevent beneficiaries from having any information in relation to a Foundation. The protection for beneficiaries provided by the Law comes through the requirement for a Qualified Member and the role of the Guardian.

Potential Uses

1. Discrete structures for high net worth clients

Currently where a family establishes a private trust company ("PTC") to act as trustee to a number of trusts, the shares of the PTC will typically be owned by a non-charitable purpose trust or by a company limited by guarantee. In future it will be possible for a Foundation to be the owner of the PTC shares or even be the trustee itself. Clients from regions more familiar with Foundations may prefer this.

Foundations could also be used to own shares of any corporate protector or enforcer.

The attraction of the PTC is that family members or family advisers are able to be directors of the PTC. Equally those individuals will be able to be Council Members of a Foundation.

2. The holding of assets which are "wasting" or subject to volatility in value

In traditional trust structures, careful drafting of the trust instrument is often necessary where the purpose of the trust is to hold a single asset such as a business, artwork, an aeroplane or a boat. Given the trustee's duty to diversify, act prudently, and in the best (financial) interests of the beneficiaries trustees are often nervous about holding such assets. Foundations may become the preferred vehicle for such assets. It is possible under the Law to establish a Foundation specifically to hold such an asset and the Council (with its Qualified Member) will not be subject to the same duties as trustees referred to above. The Council's duty (and indeed ultimately the Guardian's) is to ensure the object of the Foundation (namely the holding of the asset) is achieved.

3. A Foundation for Discretionary Distributions

Clients may want to incorporate the type of appointment and advancement provisions which are typically found in discretionary trusts into a Foundation. Accordingly, the Regulations would be drafted on the basis that the Foundation's assets were to be held for the benefit of a class of beneficiaries, with the Council (or the Guardian or some other third party such as the Founder) having the power to select from within the class (or indeed to add to or exclude from the class) who and when benefits might be provided.

4. A Foundation for Charitable and Non-Charitable Purposes

In certain jurisdictions, it is common for high net worth clients to use Foundations for their charitable and benevolent giving. Foundations under Jersey law can be created for both charitable and non-charitable purposes and the flexibility the Law allows in respect of the drafting of the Charter and Regulations, makes Jersey Foundations attractive for this purpose.

5. Reservation of Powers

Frequently trust deeds will be drafted with an express reservation of powers in the hands of the settlor of the Trust (or a third party of his choice), the most common power to be reserved being that of investment. In much the same way it will be possible for powers to be reserved to a Founder of a Foundation. Alternatively, powers can be reserved to the Guardian or indeed any other person depending on the Founder's preference.

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The attraction to using a Foundation as opposed to a trust where the power to direct investments is to be reserved is that the Council has no overriding duty to monitor the performance of the investment.

6. An Executive or Supervisory Role for the Guardian

As stated, each Foundation must have a Council containing a Qualified Member and a Guardian. The Guardian's role is to ensure that the Council is carrying out the objects of the Foundation. However, it would be possible to limit the powers of the Council and to reserve to the Guardian the most significant powers. In this way, the Guardian would have an executive role. An attraction for potential clients is that the Founder (or his appointee) could be the Guardian. Alternatively, we have seen other Foundation structures, in which the family, through a corporate Guardian, would have a supervisory role only, whereby they can oversee the actions of the Council; this could be achieved by requiring the Council to obtain the Guardian's consent before exercising a particular power.

7. Holding "orphan" assets

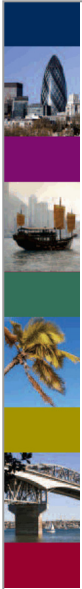
Traditionally charitable trusts have been used to hold SPV companies in a variety of financing structures and there may be a wide variety of reasons why a company may need to be established but it needs to be owned separately from the rest of a structure. A Foundation is an "ownerless" incorporated vehicle which is ideally suited to this type of planning.

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